No. 95-489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, FAIR GOVERNMENT FOUNDATION, ALLIED EDUCATIONAL FOUNDATION; U.S. SENATORS ALFONSE M. D'AMATO, MITCH McCONNELL; U.S. REPRESENTATIVES HENRY J. HYDE, BOB LIVINGSTON, JOE BARTON, BOB WALKER; BILL FRENZEL AND EUGENE McCARTHY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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February 16, 1996

CASILLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 202-223-1220

38 pp

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INTERESTS OF AMICI CURIAE

The **Washington Legal Foundation** (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide. WLF engages in litigation and the administrative process in a variety of areas of constitutional and statutory law. In particular, WLF has filed numerous briefs in this and lower courts advocating a strong and robust protection of the First

Amendment in the political and commercial context. *See, e.g., Meyer v. Grant,* 486 U.S. 414 (1988); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990); *Cincinnati v. Discovery Network, Inc.,* 113 S.Ct. 1505 (1993); *Rubin v. Coors Brewing Co.,* 115 S.Ct. 1585 (1995).

The **Fair Government Foundation** (FGF) is a non-profit, non-partisan organization that conducts research and public education on campaign finance and election law issues. Established in 1994 and chaired by U.S. Senator Paul Coverdell, FGF seeks to prevent government encroachment on constitutional liberties, to preclude improper governmental interference in the political process, and to serve as a "watchdog" of the Federal Election Commission.

The **Allied Educational Foundation** (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education and study in law and public policy. AEF has appeared before this Court as an amicus curiae along with WLF in numerous cases and shares WLF's interests.

U.S. Senator **Alfonse M. D'Amato** is a duly elected Senator from New York. In addition to his legislative duties, including serving as Chairman of the Senate Banking Committee, Senator D'Amato is Chairman of the National Republican Senatorial Committee. U.S. Senator **Mitch McConnell** is a duly elected Senator from Kentucky, and Chairman of the Senate Select Committee on Ethics.

U.S. Representative **Henry J. Hyde** of Illinois is Chairman of the House Judiciary Committee; U.S. Representative **Bob Livingston** of Louisiana is Chairman of the Appropriations Committee; U.S. Representative **Joe Barton** of Texas is Chairman of the House Subcommittee of Oversight and Investigation of the House Commerce Committee; and U.S. Representative **Robert S. Walker** of Pennsylvania is Chairman of the Science Committee.

Bill Frenzel is a former U.S. Representative from Minnesota who served in office from 1971 to 1991. During his tenure, Mr. Frenzel was a leading advocate and expert in ethics and campaign finance reform. In 1974, he introduced a bill to create the Federal Election Commission, but subsequently became a critic of the FEC's repressive actions. **Eugene McCarthy** is a former U.S. Senator from Minnesota and former presidential candidate whose campaign committee was a plaintiff in *Buckley v. Valeo,* 424 U.S. 1 (1976). Senator McCarthy has long been a vocal critic of the Federal Election Commission's suppression of First Amendment rights.

All the amici believe that 2 U.S.C. § 441a(d)(3), which limits state party committee expenditures, is an unconstitutional relic of the Federal Election Campaign Act following the *Buckley* decision. In addition, it has been interpreted and enforced by the FEC in an arbitrary and unconstitutional manner. Enforcement of this provision also perversely forces elected officials to spend more time raising funds from private sources rather than being able to rely more on the support of their respective party organizations in the form of party expenditures, such as the political speech at issue in this case.[1]

SUMMARY OF ARGUMENT

Political parties engage in core First Amendment political speech, but suffer unconstitutional debasement by the Federal Election Campaign Act of 1971, as amended, (2 U.S.C. § 431 *et seq.*) (the "Act"), and Federal Election Commission ("FEC" or the "Commission") regulations. By federal fiat, but contrary to fact or common sense, political parties are deemed incapable of making "independent expenditures," and therefore subject to rigorous and unconstitutional limitations on vital First Amendment

[1] Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

freedoms. Amici contend that the limitations on party expenditures for political speech are unconstitutional, regardless of whether such expenditures are called "independent" or "coordinated." If, however, the Act survives strict scrutiny, it must at least be strictly construed, and the Federal Election Commission unambiguously instructed to limit its enforcement to the "express advocacy" standard originally set forth by this Court in *Buckley v. Valeo*, rather than the vague and subjective "electioneering message" standard the FEC has adopted.

ARGUMENT

The Colorado Republican Federal Campaign Committee ("Colorado Committee") publicly criticized an elected official's voting record on defense spending and a balanced budget. Such political criticism would seem, in its modest way, to vindicate the highest aim of the First Amendment, and thus exceed the reach of government control.

> Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. * * * Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). The Colorado Committee's political speech might have been commended as vindicating "a fundamental principle of the American government." Instead it was prosecuted by the Federal Election Commission ("FEC"), and subject to suppression, civil fines, and this decade of litigation.

I. AS THIS CASE ILLUSTRATES, POLITICAL PARTIES ENGAGE IN CORE FIRST AMENDMENT POLITICAL SPEECH THAT IS UNCONSTITUTIONALLY BURDENED BY THE FEDERAL GOVERNMENT.

A. When Political Parties Criticize Government Officials and Debate Public Issues, They Vindicate the Highest Aims of a Deliberative Democracy.

The value of public debate itself is not debatable. All rally around our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, "[i]nformation relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).[2]

Political parties should be solaced by the First Amendment's protection of their most fundamental activities—open criticism of public officials and the dissemination of political information. "To punish the exercise of this right to discuss public affairs or to penalize it ... is to abridge or to shut off discussion of the very kind most needed." *New York Times Co. v. Sullivan*, 376 U.S. at 297 (Black, J., concurring). But as this case illustrates, political parties suffer special burdens on "discussion of the very kind most needed." *Id.* The Colorado Committee's criticism of Tim Wirth's voting record included 19 words that the federal government examined and sought to suppress: "Tim Wirth,"

[2] *See also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) (same).

said the Colorado Committee, "has a right to run for Senate. But he doesn't have a right to change the facts."

The First Amendment offense at issue in this case perhaps has little of the crudeness—of either speech or state reaction—that inspired hallmarks of First Amendment jurisprudence.[3] The Colorado Committee's speech does not arouse alarm that its unpopularity might have been the primary reason for its suppression. Indeed, the Colorado Committee was rather gracious, and the FEC's response rather mechanical. But therein lies perhaps a graver threat than the crudeness that inspires such exacting judicial solicitude. Here, the motive for the First Amendment offense seems worthy. At stake, theoretically, is the integrity of our elections and our representative democracy. Some erosion in the integrity of the First Amendment may seem a tempting trade. If that instinct be detected, then a trenchant scrutiny becomes so much more important—lest the First Amendment lose by default rather than demonstrated necessity.

B. The FEC Illogically Condemns Political Parties to "Arm of the Candidate" Status, Even If No Candidate Exists, and Thereby Cripples Political Parties' Ability to Engage in Core First Amendment Speech.

The inquiry is not whether an entity has the same First Amendment rights as individuals, but whether the challenged statute abridged the kind of expression that the First Amendment was designed to protect. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Unfortunately, the FEC suppresses expression plainly within the contemplation of core First-Amendment protection by an arbitrary debasement of political parties.

[3] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 399 (1989) ("America, the red, white, and blue, we spit on you."); *Cohen v. California*, 403 U.S. 15, 16 (1971) ("Fuck the Draft").

Whatever limited purpose may be served by privileging an individual Democrat or an individual Republican—or, indeed, groups of party loyalists that are not formally "parties"—over the political parties to which they contribute or belong, the *magnitude* of the privileging in this case serves no legitimate purpose.[4]

1. By Federal Fiat, Political Parties Cannot Make "Independent Expenditures," Regardless of Whether Any Conceivable "Corruption" Justification Exists.

In the two decades since *Buckley*, it has become a fixture of First Amendment jurisprudence that "independent expenditures" for political speech—even where federal campaigns may be implicated—enjoy robust protection.[5] That solicitude for "independent" spenders—and for deliberative democracy—does nothing for political parties.

According to the FEC, political party committees, as defined by regulation,[6] can only make "coordinated expenditures," subject to the limitations of § 441a(d), and "are incapable of making independent expenditures."[7] All

[4] Of course, "[a]ny interference with the freedom of a [political] party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

[5] Restrictions on independent expenditures "must be analyzed with great solicitude and care, because independent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 669-70 (Brennan, J., concurring) (*quoting Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (*quoting Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

[6] The political party committees deemed incapable of making "independent expenditures" are the national committee of a political party, and "a State committee of a political party, including any subordinate committee of a State committee." 11 C.F.R. § 110.7(b)(1) (1995).

[7] Advisory Opinion 1985-14 at 5819 n.4 (*citing* 11 C.F.R. 110.7(a)(5)

"coordinated" expenditures are, in turn, treated by law as "contributions," and thus subject to strict limitations. *See* 2 U.S.C. § 441a(a)(7). But the federal government thus consigns too much to the restrictive category, "contribution," and entirely fails to appreciate the First-Amendment freedoms that this Court has jealously guarded in the arena of political discourse.

Amici agree with Petitioners that speech expenditures by a party cannot be constitutionally limited, even if pre-arranged and coordinated with a particular candidate. Alternatively, amici argue that the statutory regimen, to survive strict scrutiny, must be narrowly construed to apply only to express advocacy speech that is *in fact* pre-arranged and coordinated with a particular candidate.[8] The Tim Wirth ad at issue in this case was neither express advocacy, nor was it pre-arranged or coordinated with a particular candidate (no Republican candidate having been nominated).

• • •

The *Buckley* Court acknowledged the dangers of actual and apparent *quid pro quo* corruption that stem from a system allowing large direct donations, and thus upheld the limitations on direct donations to candidates for federal election. 424 U.S. at 26-29. The Court emphasized, however, that "the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the

and (b)(4); Advisory Opinions 1984-15 and 1980-119 (¶ 5561); General Counsel's Report, MUR 273.); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 28-29 & n.1 (1981) (noting regulation, without ruling on issue).

[8] The FEC's *per se* rule violates not only the First Amendment, but also the Fifth Amendment due process clause because it does not allow political parties to rebut the presumption of coordinated expenditures. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Heiner v. Donnan*, 285 U.S. 312 (1932).

institutional press, candidates, and *political parties*." *Id.* at 28-29 (emphasis added).

In sum, the restrictions on direct contributions survived precisely because they did *not* materially penalize political debate. The justification for limiting contributions is therefore irreconcilable with the overt suppression of the Colorado Committee's political speech in this case. The Colorado Committee's speech was never examined to determine whether it was *actually* the kind of "direct contribution" that aggravates the risk of *quid pro quo* corruption, or whether it might *actually* be more like an "independent expenditure." Instead, it was *presumptively* the kind of political speech most likely to involve corruption. The federal government simply cannot burden protected political speech with such blunt instruments.

With the *Buckley* Court's distinction between "independent" and "coordinated" expenditures as a backdrop, this case well illustrates the mischief of consigning *all* party expenditures to the shackles of "contributions." Direct contributions are easy to link directly to the campaign, without intermediation, and only marginally related to First Amendment expression. Independent expenditures, by contrast, are not only quintessential political speech, but

> may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidates.

Buckley, 424 U.S. at 47. The Colorado Committee ads were treated as "coordinated expenditures" even though—at the time the ads ran—there was no Republican candidate for the Senate seat sought by Tim Wirth. Clearly there was no

"prearrangement and coordination" with a Republican candidate. Yet the federal government determines, categorically, to treat this *factual absence* of "prearrangement and coordination" as *legal* prearrangement and coordination, even if a Republican candidate never materializes, and even if a Republican candidate that *does* ultimately materialize would never have approved the expenditures.[9]

While it may certainly be presumed that state political parties desire the success of their candidates and defeat of the others, it does *not* follow that political parties are more likely instruments of corruption. And the *consequence* of conceding that political parties always favor their candidates must still be narrowly tied to the singular regulatory justification of corruption. It is both counter-factual and counter-intuitive to maintain that parties are singular corrupting influences upon their own candidates.

Political parties compete for the reins of government. They do not therefore possess the media's inherent institutional independence from government. But of course, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Bellotti*, 435 U.S. at 782. When we locate enhancements of deliberative democracy in institutions *other* than the press, it serves no

[9] The Colorado Committee ads criticized the fact that Tim Wirth had voted against new weapons systems and against the balanced budget amendment. It is among the many ironies of the FEC's regime that the Colorado Committee's political speech would have been deemed "coordinated," even if a Republican candidate that later announced *likewise* had voted against the balanced budget amendment, or against new weapons systems, or for whatever reason likewise opposed a balanced budget amendment or spending on new weapons systems. In that event, the Colorado Committee ads would clearly "provide little assistance to the candidate's campaign and indeed may prove counterproductive," *Buckley*, 424 U.S. at 47—if not outright embarrassing. But by federal law, they would be "coordinated expenditures," *de jure* "prearrangements" though absolutely not in fact.

interest to suppress these enhancements merely because they originate outside the press.

Political parties do not operate as a perpetual counterpoint to the power of government; indeed, they seek to elevate their own into government. Do we then consign political parties to the status of government itself for First Amendment purposes? Quite the contrary: it is precisely party ambition that guarantees the greatest incentive to ferret out and expose the misdeeds and misinformation of the *other* parties.[10] Political parties, sometimes even more than the press, guarantee the *opposition*. A journalist might establish a comfortable rapport with the public servants on her beat, perhaps even a comfort level that compromises her zeal to pose the hard questions. But the other party will *always* demand accountability. Political parties are critical institutions of political speech. Their salutary effect on accountable government cannot be doubted, even if it be conceded that they care particularly about the misdeeds of the *other* party.

Consider this hypothetical ad that might have been run by the Colorado Committee. A Republican party member discovers evidence that a Democratic officeholder and candidate for reelection has been guilty of classic *quid pro quo* corruption—that is, assume that he has performed a legislative favor in exchange for a contribution, however disguised, to his election campaign. The Colorado Committee runs an ad publicizing the *quid pro quo* arrangement—thereby exposing precisely the venality targeted by the Federal Election Campaign Act. Yet this

[10] *Cf. Grosjean v. American Press Co.*, 297 U.S. 233, 247, 250 (1936) (invalidating tax on press and praising speech that helps to ensure citizen awareness of the "doings or misdoings of their government," and noting that "informed public opinion is the most potent of all restraints upon misgovernment."); *Minneapolis Star & Tribune Co. v. Minnesota*, 460 U.S. 575, 585 (1983) ("an informed public is the essence of working democracy").

extraordinary *private* vindication of the only justification for *government* involvement in the process would necessarily suffer suppression by the government.

At some point, the legal fictions that inform legislation and regulation, however expedient, must bend to reality. This is acutely true when fundamental constitutional rights are at stake. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 265 (1986) ("*MCFL*").

The theoretical "possibility" of corruption cannot forever substitute for empirical or rational justification.[11] As this Court stated recently, "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than 'simply posit the existence of the disease to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995).

The federal government has never asserted more than a conjectural harm to the pure political speech of political parties. The substantial burdens on such core expression accordingly cannot stand.

[11] *See Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

2. Political Parties, Like Political Action Committees, Should Be Free to Criticize Elected Officials Because Their Resources Reflect Actual Political Support, Rather Than Capital Amassed in Economic Markets.

"The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Even for-profit corporations, the entities demonized in much election law jurisprudence, may make unlimited expenditures that celebrate one public official or brutalize another, as long as they do not expressly instruct the electorate on how to vote. However, if any such expenditure, independent or otherwise, expressly advocates the election or defeat of a candidate for federal office, then it cannot be made out the corporation's general treasury. *See* 2 U.S.C. § 441b(a). Corporations may participate in federal elections only through the instrument of a political action committee. *See* 2 U.S.C. § 441b(b)(2). As this Court explained in ruling that for-profit corporations are properly subject to this narrowly-tailored intrusion on their political speech:

> The resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258. To avoid the potential political distortion of capital amassed in the marketplace, corporations are forbidden the use of this capital in federal election campaigns. But a corporation may make independent expenditures through separate segregated funds (a political

action committee). "Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660-61 (1990).

This careful limitation—that leaves a suitable alternative channel for corporate political speech—dramatically illustrates the unfairness of the unique disability imposed upon state political parties, which cannot employ the expedient of "independent expenditure" through a "political action committee," and the *direct* expenditures of which are severely curtailed.

Just as the corporate alternative of a "political action committee" achieves the requisite actual link between political support and financial resources, so the resources of a party committee *precisely* indicate popular support for the committee's political ideas. Indeed, the resources of a party committee—taken as a surrogate for specific political support—are even more precisely indicative than the resources of a corporate political action committee, which may come from donors who lack a clear idea of the parent corporation's political agenda. Thus, the judicial solicitude for corporate campaign speech ought to extend all the more vigorously to political parties.

The illogic of specially debasing political parties would be troublesome in any context. But when the political party engages in pure political speech, it should be presumptively free—and certainly not lesser in liberty than for-profit corporations.[12]

[12] Amici submits that this Court's rationale in *MCFL* compels the unfettered freedom of political parties to engage in core political speech, whether denominated "coordinated" or "independent."

C. Source Restrictions and Disclosure Requirements Achieve Any Legitimate Government Aim to Combat "Corruption" Without Offending the First Amendment.

Political campaign regulation implicates core First Amendment concerns, and cannot be justified apart from the genuine specter of corruption. Indeed, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985); *see Buckley*, 424 U.S. at 25-27.[13]

Eliminating the present burdens on pure political speech would hardly unloose political parties to play havoc on electoral integrity. If the caps on political speech were lifted today, political parties would remain subject to a substantial regulatory regimen. If candidates really can be corrupted by their own parties—and amici dispute this counter-intuitive notion—then the federal government retains abundant tools to address any such actual or apparent corruption.

The comprehensive statutory and regulatory scheme controls from whom political parties may accept money, how much they may accept, and the extent to which they must disclose contributions to candidates and from contributors. The Act prohibits party committees from accepting money, into their federal-election accounts, from certain sources—including the general treasury funds of corporations, labor organizations, and national banks; federal government contractors; and foreign nationals. 2 U.S.C. § 441(b), (c) and (e); 11 C.F.R. §§ 110.4, 114.2(a) and (b).

The Act and its regulations further restrict the amounts of contributions for federal elections that local, state and

[13] *See also Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981); *California Medical Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981); *Bellotti*, 435 U.S. at 790-91.

national parties may receive,[14] and impose limits on the amounts of money a party committee can contribute to a federal candidate committee. These limitations greatly reduce any possibility of corrupt arrangements between party committees and candidates responding solely to the party committees funding their campaigns. Local and state parties may make a financial contribution up to a combined amount of $5,000 per election;[15] multicandidate national party committees and multicandidate PACs may contribute up to $5,000 per election each, and non-multicandidate PACs may contribute up to $1,000 per election to candidate committees. 2 U.S.C. § 441(a); 11 C.F.R. §§ 110.1, 110.2.

Political parties must disclose the total receipts and disbursements, broken down into certain categories, and provide an itemized accounting.[16] Moreover, candidate

[14] Local or state party committees may receive from individuals or partnerships up to $5,000 as a combined total per year, national party committees up to $20,000. All party committees may make unlimited transfers among themselves. Local and state party committees may receive up to $5,000 per year as a combined total from multicandidate political action committees ("PACs") and non-multicandidate PACs, while national party committees may receive up to $15,000 per year from multicandidate PACs and $20,000 per year from non-multicandidate PACs. 2 U.S.C. § 441(a); 11 C.F.R. §§ 110.1, 110.2, 110.3.

[15] A state party committee shares its limits with local party committees in the same state, unless a local party can demonstrate its independence. 11 C.F.R. § 110.3(b)(1)(ii) and (3).

[16] 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(a)(4). Party committees must itemize: contributions from political committees; transfers from other party committees and party organizations; loans received; loan repayments received; refunded contributions from political committees; and contributions that exceed $200 from the same source from individuals, offsets to operating expenditures, and other receipts such as interest and dividends. Itemized information includes: the name and address of the contributor, the name of his or her employer, his or her occupation, the date of receipt, the amount, and the aggregate of all receipts received that year from the same source.

committees must disclose all contributions from party committees. 2 U.S.C. § 434(b)(2)(C); 11 C.F.R. § 104.3(a)(3). These disclosures are matters of public record.

The federal government's move against pure political speech does not occur in a vacuum. It is merely *another* weapon in a substantial federal arsenal for fighting *not* merely corruption itself, but the tantalizing *possibility* of corruption. While the means to combat actual corruption may yield little to excite the regulatory imagination, the means for combating *possible* corruption are virtually inexhaustible. The danger to the First Amendment is plain.

Broad prophylactic rules *outside* the ambit of protected political speech may pass muster. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).[17]

Two decades after this Court first articulated a "corruption" justification for limited government regulation of political expression—and a full decade since this lawsuit was filed—the federal government has yet to identify any genuine "corrupting" effect of party political speech.

II. EVEN IF THE STATUTE IS FACIALLY CONSTITUTIONAL, ITS SCOPE MUST BE LIMITED TO "EXPRESS ADVOCACY," AS STRICTLY CONSTRUED IN *BUCKLEY*.

If the direct suppression of core First Amendment speech does not categorically condemn the restriction on political

[17] This Court, in a series of analogous charity-fundraising cases, repeatedly rejected government's asserted interest in preventing fraud, emphasizing that existing fraud laws and disclosure requirements addressed the problem without offending the First Amendment. *See, e.g., Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 789 (1988). Political parties—engaged in pure political speech—surely invite the same respect.

parties, that is, if a compelling justification can be identified to save the restriction in principle, then it remains to be examined whether the restriction on speech, as applied, violates the First Amendment in ways not apparent on the face of the law. If the law, as applied, overreaches, then it becomes this Court's role to construe the law with sufficient rigor to save it from unconstitutionality, if possible. *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A. Strict Judicial Interpretation of the "Express Advocacy" Standard Is Necessary to Arrest the FEC's Expansion of Regulation Over Political Speech.

Since the FEC's enforcement action here plainly implicates core First Amendment rights, this Court must examine the FEC's interpretation of its statute with "exacting scrutiny." *McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511, 1519 (1995).

This Court in *Buckley* distinguished between, on one hand, protected "discussion of issues *and candidates*," and on the other, "advocacy of the election or defeat of candidates." *Buckley*, 424 U.S. at 42 (emphasis added). Lamenting that this distinction might well "dissolve in practical application," the Court imposed a rigorous bright-line test to avoid abuse of the First Amendment. The term "expenditures," held the Court, must be construed to apply "only to expenditures that *in express terms* advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 42-44 (emphasis added).

In order to eliminate overbroad regulation of speech, the Court provided very specific guidance: "This construction would restrict the application [of the Act] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'elect,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

Id. at n.52; *see MCFL*, 479 U.S. at 248-49. In this case, the Colorado Committee ad was clearly a permissible discussion of "issues and candidates" that this Court declared off-limits to government interference.

B. The FEC Repeatedly Disregards This Court's First Amendment Rulings on the Limits of Political-Speech Regulation.

For two decades, the bridle of *Buckley* has restrained the most obvious aggrandizements of government regulation. But the FEC's charge is both solemn and slippery: target the appearance of corruption in federal elections. In its embrace of a worthy goal, the agency has habitually overreached.

The FEC's enforcement decisions have disregarded this Court's warning that any restrictions on freedom of expression "must be minimal, and closely tailored to avoid overreaching or vagueness." *See Buckley*, 424 U.S. at 78-82; *MCFL*, 479 U.S. at 249. The result has been a series of FEC enforcement actions that has led to eight lower court decisions, not counting this case—seven of which have rebuked the FEC's reading of "express advocacy." However, the grounds applied by the lower courts have been far from uniform, further underscoring the constitutional danger of attempting to apply an "express advocacy" standard beyond the precise guidance of *Buckley* and *MCFL*. As applied by the FEC in this and other cases, the Act has become constitutionally infirm. As demonstrated, *infra*, the FEC has substantially diluted this Court's "express advocacy" standard to embrace vague and subjective "electioneering messages."

1. Lower court decisions

A series of lower court cases brought by the FEC to enforce its test for "express advocacy" illustrate its persistent attempts to inflate the standard. The Second Circuit aptly characterized the FEC's expansion attempts:

> [C]ontrary to the position of the FEC, the words "expressly advocating" means [sic] exactly what they say ... [T]he FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or *implied*, purpose of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley*.

FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) ("*CLITRIM*").[18]

And just this week, a federal district court invalidated the FEC's new regulations defining "express advocacy," 11 C.F.R. § 100.22. "Once the Supreme Court has spoken on an issue . . . it is not the role of the FEC to second-guess the wisdom of the Supreme Court." *Maine Right to Life Committee v. FEC*, No. 95-261-B-H, slip op. at 10 (D.Me. Feb. 13, 1996).

Ignoring both *Buckley* and *CLITRIM*, the FEC's crusade to expand the standard has led to the inconsistent interpretation and enforcement that the Court feared would chill political debate. By refusing to accept this Court's *Buckley* standard, the FEC has put all speakers engaging in the marketplace of political ideas

> wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Thomas v. Collins, 323 U.S. 516, 535 (1945).

[18] *See also Faucher v. FEC.*, 928 F.2d 468, 472 (1st Cir.) ("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional question the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."), *cert. denied*, 502 U.S. 820 (1991).

The lower court opinions since *Buckley* demonstrate the "varied understanding" warned of in *Thomas*. In *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315, 316 (D.D.C. 1979) ("*AFSCME*"), despite the absence of any express words urging the election or defeat of a candidate, the FEC contended that posters qualified as express advocacy under its reading of the FECA. The court squarely rejected the FEC's position, finding no express advocacy of the type described in *Buckley*. Even though the poster included a clearly identified candidate and "may have tended to influence voting, it contains communication on a public issue widely debated during the campaign." *Id.* at 317.

In *CLITRIM*, 616 F.2d 45, the FEC charged that a non-profit unincorporated association had published a leaflet allegedly expressly advocating the election or defeat of a clearly identified candidate without filing with the FEC or using the correct disclaimer.[19] The Second Circuit rejected the FEC's charges, finding that "the words 'expressly advocating' mean exactly what they say." *Id.* at 53. The court continued:

> [t]he nearest it comes to expressly calling for action of any sort is its exhortation that 'if your Representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government.' Neither this nor the voting chart calls for anyone's election or defeat.

Id.

The Ninth Circuit took a different approach in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). It reviewed highly critical full-page ads taken out in

[19] The four page leaflet, which cost $135, and was published by CLITRIM, a project of the John Birch Society, advocated lower taxes and less government, and included a photograph and a chart characterizing 21 of 24 votes that a local congressman cast as being for "higher taxes and more government." *Id.* at 49-51.

major newspapers one week before the presidential election which featured the caption "Don't let him do it" about incumbent President and candidate Jimmy Carter. While the FEC agreed that the ad did not contain words expressly telling people to vote against President Carter, it argued that the *Buckley* decision merely provided guidelines for determining express advocacy.[20]

In *Furgatch*, the Ninth Circuit adopted a different standard than the *AFSCME* and *CLITRIM* courts, holding that express advocacy is not strictly limited to communications using certain key phases and that it was therefore compelled "to interpret and refine the standard...." 807 F.2d at 861; *cf. MCFL*, 479 U.S. at 249 (adopting the *Buckley* bright-line test). "The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch*, 807 F.2d at 863. The court proposed a standard for express advocacy: that speech, when read as a whole and with limited reference to external events, may only be interpreted as an exhortation to vote for or against a specific candidate. In attempting to craft a definitive test, the Ninth Circuit stated:

> This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated.

[20] Significantly, while the *Furgatch* decision was handed down on January 9, 1987, it contains no citations to this Court's decision only three weeks earlier in *MCFL*. Thus, the *Furgatch* court ignored the *MCFL* decision's clear reiteration of the *Buckley* strictures.

Id. at 864. The panel also established as part of its test that "if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy. . . ." *Id.* Despite the attempt to craft a more expansive standard, no other court has reached a conclusion consistent with the Ninth Circuit's, with the exception of the court below in this case.[21]

In *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) ("*NOW*"), the court used the "reasonable minds could differ" test of *Furgatch*, but reached a different conclusion based on the facts. In ruling against the FEC, the *NOW* court observed:

> In *Buckley*, the Court agreed that funds spent to propagate one's views on issues without expressly calling for the election or defeat of a clearly identified candidate are not covered by the FECA. ... NOW's letters do not contain pointed exhortations to vote for or against particular persons.

NOW at 433-34.

In *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), the FEC again sought to expand the scope of express advocacy beyond its permissible bounds. The Maine Right to Life Committee, Inc., a nonprofit organization that promoted pro-life issues, sought to publish a newsletter that surveyed candidates' positions on pro-life issues. *Id.* at 469. Despite the absence of any explicit language urging readers to vote for certain candidates, and the presence of the disclaimer, the FEC contended that this publication constituted express advocacy. *Id.* at 471. The First Circuit rejected the FEC's argument that the publication contained express advocacy: "In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the

[21] The FEC has adopted this standard for internal enforcement matters and has based much of its recently completed "express advocacy" rulemaking on a misreading of the *Furgatch* decision.

Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*." *Id.* at 472.

The court in *FEC v. Survival Education Fund,* 1994 U.S. Dist. Lexis 210 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 65 F.3d 285 (2nd Cir. 1995) also rejected an attempt by the FEC to apply a broad "express advocacy" standard. The FEC claimed the groups sent out two letters advocating President Reagan's defeat that failed to include a disclaimer telling who paid for them and stating that they were not authorized by any candidate. While finding that the letters, which came four months before the election, were hostile to President Reagan, the court said they did not expressly advocate voting against him. Citing the "express words" of *Buckley*, the court held:

> It is clear from the cases that expressions of hostility to the positions of an official, implying that that official should not be reelected -- even when that implication is quite clear -- do not constitute the express advocacy which runs afoul of the statute. Obviously, the courts are not giving a broad reading to this statute.

Id. at 4.

The Second Circuit affirmed the summary judgment in SEF's favor, holding that the statute "cannot constitutionally be applied to burden any speech, whether express advocacy or not, by a nonprofit political advocacy corporation like SEF which is independent of corporate and labor interests." *FEC v. SEF*, 65 F.3d 285, 290 (2d Cir. 1995).

In *FEC v. Christian Action Network,* 894 F. Supp. 946 (W.D.Va. 1995), the FEC charged that a non-profit corporation used its treasury funds to air anti-Clinton advertisements that, according to the FEC, constituted express advocacy of the defeat of the Clinton-Gore ticket in the 1992 election. Demonstrating the difficulty in uniformly applying a reasonable person standard instead of the Court's bright-line *Buckley* test, the district court came to a much

different conclusion than the *Furgatch* court. Despite similar facts, the *Christian Action Network* court found the ads did not contain "explicit words or imagery advocating electoral action." *Id.* at 948. To the contrary, the court said the ads represented issue advocacy informing the public about political issues, and therefore protected political speech. *Id.*

In reaching this conclusion, the court surveyed the prior cases and, noting the problems with the *Furgatch* standard, found the ads did not constitute express advocacy since they "were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute 'express advocacy' as that term is defined in *Buckley* and its progeny." *Id.* at 953. Rather, the court found that the ads discussed issues. "[T]he ability to present controversial viewpoints on election issues has long been recognized as a fundamental First Amendment right." *Id.* at 955 (citations omitted).

Most recently, the United States District Court for Maine invalidated the FEC's new "express advocacy" regulations on the grounds they exceeded the constitutionally permissible boundaries set forth in *Buckley*. *Maine Right to Life, supra*, slip op. at 10. The court explicitly rejected *Furgatch*, which it identified as the FEC's support for its regulations, stating that the ads at issue in *Furgatch* were "precisely the type of communications *Buckley, Massachusetts Citizens for Life* and *Faucher* would permit." *Id.* Contrasting *Furgatch* with the other cases, the district court said:

> *Furgatch* allowed the FEC to prohibit the speech (recognizing it as a 'very close call,' *id.* at 861); *Buckley, Massachusetts Citizens for Life* and *Faucher* call for letting it go forward in order to preserve the discussion of public issues even at the risk that it is used to elect or defeat a candidate.

Id.

In sum, this Court established a bright line test to prohibit governmental intrusion into protected political discourse. By providing specific examples of words and phrases that constituted "express advocacy," this Court established a precise framework that allows participants in the marketplace of ideas to know exactly what is permitted and what is not. This approach ensures against the inhibitions of laws that probe the shades and nuances of words. By establishing such a framework, the Court elevated First Amendment rights over the regulations put in place by the statute.

2. FEC Advisory Opinions

Similar to its record in lower court cases, the FEC's advisory opinions demonstrate an inconsistent application of the "express advocacy" standard and one that cannot be reconciled with *Buckley*. Indeed, in the advisory opinion process, the Commission has gone beyond its unconstitutionally expansive "express advocacy" standard and has applied an even broader "electioneering message" standard to decide whether a political party's expenditures, like the ones at issue here, are subject to the "coordinated party expenditure" limit of 2 U.S.C. § 441a(d).

In Advisory Opinions 1984-15 and 1985-14,[22] the Commission attempted to separate a political party's lawfully unlimited issue-oriented or party-building speech from those messages that are subject to the limits of section 441a(d). The Commission held that a party's expenditures will be allocable to the coordinated limits if they merely contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, at 11,185. According to the Commission, an electioneering message "includes statements 'designed to urge the public to elect a

[22] FEC Advisory Opinion 1984-15, *Fed. Election Camp. Fin. Guide* (CCH) ¶ 5766, at 11,067-3 (1984); FEC Advisory Opinion 1985-14, *Fed. Election Camp. Fin. Guide* (CCH) ¶ 5819, at 11,182 (1985).

certain candidate or party.' *United States v. United Auto Workers*, 352, U.S. 567, 587 (1957)." *Id.*

In further articulating this broad standard, the Commission held that coordinated party expenditures cover all advertisements whose "clear import and purpose . . . (is) to diminish support for any Democratic Party Presidential nominee and to garner support for whoever may be the eventual Republican party nominee." FEC Advisory Opinion 1984-15, at 11,069. Specifically, the Commission found certain ads were subject to the limit because they "effectively advocate the defeat of a clearly identified candidate in connection with (an) election and thus have the purpose of influencing the outcome of the general election." *Id.* at 11,070.

Accordingly, the Commission does not even employ its own express advocacy test for allocating a party committee's expenditures to the coordinated limit, but instead uses a wide-open "electioneering message" test that sweeps within the limit any statement by a party committee which may "diminish support" for, or "effectively" advocate a candidate's election. It was precisely that test which the Commission used to allocate the expenditures in this case, and therefore unconditionally restricted the First Amendment rights of the Colorado Republican Party.

C. The FEC's New Regulations on "Express Advocacy" Further Illustrate Its Disregard of First Amendment Concerns.

In the aftermath of the Court's *MCFL* ruling, the FEC took nine years until 1995 to promulgate new regulations that include new language on express advocacy. The new regulations maintain the standard the FEC has attempted to impose since *Buckley*, which, as the recent *Maine Right to Life* decision and other cases demonstrate, is inconsistent with the bright-line *Buckley* test. The revised regulations perpetuate the infirmities discussed above by imposing a

standard which punishes speech that, in the FEC's estimation, *implies* an "electioneering message."

Under the new regulations, 11 C.F.R. § 100.22 (1995), the term "express advocacy" includes the following subjective standard:

> (b) When [the communication] taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because:
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Subsection (b) of the regulations contains the very infirmity of subjectivity that this Court sought to avoid in establishing its bright line test.[23] As the Maine district court recently observed:

> The [*Buckley*] Court seems to have been quite serious in limiting FEC enforcement to express advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited."

Maine Right to Life, slip op. at 9 (emphasis in original).

The FEC's new regulations expand the scope of "express advocacy" as follows:

[23] As a legal matter, there appears to be no difference between the "reasonable person" test introduced in the FEC's new regulations and the "implied" advocacy test the FEC used in *CLITRIM* and other cases, and the "totality of circumstances" test the FEC used in Advisory Opinions 1984-15 and 1985-14.

> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage action to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the *timing of the communication would be considered on a case-by-case basis.*

60 Fed. Reg. at 35295 (July 6, 1995) (emphasis supplied).[24]

So alarmingly eager is the FEC to impose its "reasonable person" on a case-by-case basis that its new regulations exceed even the reach of *Furgatch*, the single "express advocacy" case won by the FEC and its favorite authority for its new regulations. *Furgatch* is careful to require that the communication "when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as *an exhortation to vote for or against* a specific candidate." 807 F.2d at 864 (emphasis added). It further instructs that "speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act." Yet 11 C.F.R. § 100.22 ignores even the exhortation requirement of *Furgatch* to say that the communication taken as a whole and in the context of external events need only "encourage actions" to elect or defeat a candidate. 60 Fed. Reg. at 35295.

FEC enforcement has been a history of side-stepping this Court's admonition that "express advocacy" be strictly

[24] Furthermore, in explaining the meaning of the regulations for communications that combined electoral and issue advocacy, the FEC indicated that it would continue a totality of the circumstances test by taking the communication as a whole and evaluating "the circumstances under which" the statements were made and "with limited reference to external events." *Id.*

interpreted.[25] Each case is "unique," declares the FEC, despite the *Buckley* Court's adoption of the "express advocacy" standard *precisely* so the FEC would not infringe unnecessarily upon the First Amendment. 424 U.S. at 43-44.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[25] The vagueness of the FEC's definition of "express advocacy" or "electioneering message" cannot be cured by its advisory opinion process under 2 U.S.C. § 431(f). *See Maine Right to Life*, *supra*, slip op. at 4-5. As a practical matter, the delay attendant in procuring an advisory opinion from the FEC (up to 60 days) seriously handicaps robust political speech, which requires sufficent lead time to plan and produce, or which may require last minute changes to meet late breaking political developments. Furthermore, since advisory opinion requests are published by the FEC for comment, the political opponents or target of the proposed speech will be alerted to the advertisement and take pre-emptive measures that may dilute the efficacy of the proposed speech. If a negative decision is rendered by the FEC, the speaker is forced to incur costly and time-consuming litigation to challenge the FEC's judgment. Finally, there is no guarantee that the FEC issue any opinion, thereby forcing the speaker to risk prosecution if he or she decides to engage in political speech. These defects of the advisory opinion process chill or delay protected speech in violation of the First Amendment. *See Carroll v. Prince Anne*, 393 U.S. 175, 182 (1968); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1987).